HONG LEONG FINANCE BHD.

v.

HON HOI WENG & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C 294 OF 1983]
16 JANUARY 1987

CIVIL PROCEDURE: *Summary Judgment under O. 14 - Appeal - Pending hearing of appeal application for a stay of execution - On ground that appeal may succeed - Whether that is sufficient for a grant of stay in the circumstances.*

The 1st and 2nd defendants were sued as hirers under a hire purchase agreement while the 3rd and 4th defendants were sued as guarantors under the agreement.

The Senior Assistant Registrar gave summary judgment against the 4th defendant. The 4th defendant has appealed but the appeal has not yet been heard. Pending the hearing of appeal the 4th defendant applied for a stay of execution.

The ground relied on was that there was every probability that the 4th defendant will succeed on appeal.

Held:

[1] Where judgment is entered after a full trial of the issues (or in the case of an appeal, after a full hearing thereof) the general rule is that stay of execution pending appeal (or where it applies, further appeal) will not be granted unless there are special circumstances.

[2] But where judgment is arrived at summarily by a Senior Assistant Registrar the only requirement for a stay of execution pending appeal is that the probabilities are in favour of the appeal being allowed.

[3] In the present case, the 4th defendant has shown there is every probability that the appeal may succeed and this is sufficient for a grant of a stay of execution pending appeal.

[Stay of execution pending appeal allowed.]

Cases referred to:
Syarikat Berpakat v. Lim Kai Kok [1983] 1 MLJ 406
Re Kong Thai Sawmill (Miri) Sdn. Bhd. [1976] 1 MLJ 131
Griffiths v. Benn 27 TLR 350
Atkins v. Great Western Rly. Co. 11 TLR 400
Monk v. Bartram [1891] 1 QB 346

Legislation referred to:
Rules of the High Court 1980, O. 14

For the applicants/defendants - Mathias Chang; M/s. Suhaimi, Khor, Zulkifly & Chang
For the respondents/plaintiffs - Ong See Seng; M/s. Mah-Kok & Din

JUDGMENT

VC George J:

The cause of action the plaintiffs have as against the 4th defendant appears to be that the 4th defendant had agreed to indemnify the plaintiffs in respect of loss they may suffer as a result of the plaintiffs entering into a hire-purchase agreement in respect of a certain machine with the 1st and 2nd defendants. The 3rd defendant had guaranteed payment of amounts due from the 1st and 2nd defendants to the plaintiffs.

The 1st and 2nd defendants delivered a statement of defence. The plaintiffs sought to have it struck off as disclosing no reasonable defence and/or of being frivolous and vexatious. Abdul Razak J heard the application and dismissed it. In a written judgment he held that there were triable issues that were far from being frivolous and vexatious.

In the meantime the plaintiffs had obtained judgment in default against the 3rd and 4th defendants. That against the 4th defendant was by consent set aside after which the plaintiffs took out O. 14 proceedings against the 4th defendant. The Senior Assistant Registrar who heard it gave summary judgment against 4th defendants who have appealed. The appeal has not been heard.

Pending appeal the 4th defendant by encl. (73) applied for and obtained a stay of execution. My reasons for granting the stay are as follows:

The substantial ground relied on is the contention that there is every probability that the 4th defendant will succeed in the appeal. The argument shortly stated was that if the 4th defendant has any liability, it is only to indemnify the plaintiffs in respect of loss incurred *vis-a-vis* the hire-purchase agreement entered into by the 1st and 2nd defendants. In the face of the fact that Abdul Razak J has held that the claim as against the 1st and 2nd defendants for loss has to be disposed off after full trial and not summarily, it follows as a matter of course that the 4th defendant should be also entitled to have the issues tried and that accordingly in all probability the Judge hearing the appeal from the Senior Assistant Registrar's O. 14 judgment will allow the appeal and give leave to defend. And that accordingly the justice of the case calls for the Court granting a stay. The argument certainly has the approbation of logic.

For the plaintiffs, Counsel relied on *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406 and *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* [1976] 1 MLJ 131 to submit that unless special circumstances were shown to support the application for stay it must be refused and that merits in the appeal is not a special ground.

In *Syarikat Berpakat* it would appear that there was a judgment of the Sessions Court after a full trial. The reliance placed by Hashim Yeop Sani J (as he then was) on the rule must be looked at in that context that there had been a full trial.

In *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* in considering an application for stay pending appeal from the Federal Court to the Yang di-Pertuan Agong *Griffiths v. Benn* 27 TLR 350 was referred to.

> In *Griffiths v. Benn* the Master of he Rolls indicated that:
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> ... where, after a full hearing, a definite conclusion was arrived at by the Court of Appeal; it was not fair on a successful litigant to hamper him with any such undertaking and it would need most exceptional circumstances to induce this Court to accede to such an application.

Atkins v. Great Western Rly. Co. 11 TLR 400 was also cited. There there had been trial and presumably after the trial Judge had refused stay pending appeal, application was made to the Court of Appeal. The Court of Appeal asked for special circumstances *Smith, Hogg & Co. Ltd.* was another case cited. There it was a stay pending appeal to the House of Lords. After considering these cases the Learned Chief Justice in *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* stated the rule (at p. 132) thus:

> It is my view that where stay of execution has previously been refused by this Court after a hearing of an appeal lasting over a week, an application made to the same Court for stay pending an appeal must be supported by special circumstances.

In *Syarikat Berpakat* which had been referred to earlier, Hashim Yeop Sani J in referring to the judgment in *Monk v. Bartram* [1891] 1 QB 346 said.

In that case stay had been refused by the trial Judge and in the Court of Appeal it was held that where a stay of execution has been refused by the trial Court an application made in a Court of Appeal for a stay pending appeal must be supported by special circumstances and allegations that there has been misdirection or that the verdict or judgment was against the weight of evidence, or that there was no evidence to support the verdict or judgment are not special circumstances. Lord Esher MR in the Court of Appeal when refusing the application for stay said:

> We have made enquiries, and find that the practice in the Divisional Court has been similar to that as to appeals in this Court in cases of trials before a Judge without a jury. It has never been the practice in either case to stay execution after the Judge at the trial has refused to grant it, unless special circumstances are shown to exist.

In each of those cases there was either a full trial or a full hearing of an appeal by a superior Court.

In my view reliance on *Syarikat Berpakat* and on *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* (and on the cases cited in those judgments referred to therein) in respect of an application for stay pending appeal from the exercise of summary jurisdiction given by O. 14 by a Senior Assistant Registrar is misconceived.

An analysis of the judgments in those two cases and of the judgments cited therein shows that it would be more correct to state the rule as follows: Where judgment is entered after a full trial of the issues (or in the case of an appeal, after a full hearing thereof) the general rule is that stay of execution pending appeal (or where it applies, further appeal) will not be granted unless there are special circumstances.

It has become the practice in the High Court, certainly in Kuala Lumpur, that the Senior Assistant Registrars (many of whom are comparatively speaking junior officers) are burdened with long lists and that out of necessity they dispose of their summary jurisdiction in so summary a manner that most of the Judges who hear appeals from those decisions do not now require the Senior Assistant Registrar to even write grounds of decision but hear the appeal by way of a re-hearing of the original application, a re-hearing in every sense of that word. This is not to derogate the judicial role played by the Senior Assistant Registrars. They act as an effective filter stopping some of the more blatantly unmeritorious applications from going through the sieve.

In respect of applications for stay pending appeal, a distinction has to be drawn between a matter that was decided upon after full trial and enquiry and one summarily arrived at by a Senior Assistant Registrar. In the former case the general rule no doubt continues to be that special circumstances have to be shown (there could no doubt be exceptions to the general rule). But in the latter it seems to me that a demonstration that the probabilities are in favour of the appeal being allowed should normally be sufficient for the Court to exercise its discretion to order a stay pending appeal.

In the instant case in the face of the view taken by Abdul Razak J on the claim against the 1st and 2nd defendants and on the circumstances of the case it is my opinion that the 4th defendant has shown there is every probability that the appeal may succeed. Stay pending appeal from the Senior Assistant Registrar's decision was allowed.

Also found at [1987] 2 CLJ 227